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Counterclaim-Defendant Leadership Studies, Inc.

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

LEADERSHIP STUDIES, INC., a
California corporation,

Plaintiff,

v.

BLANCHARD TRAINING AND
DEVELOPMENT, INC., a California
corporation, and Does 1-10, inclusive,

Defendants.

BLANCHARD TRAINING AND
DEVELOPMENT, INCORPORATED,

Counterclaim-Plaintiff,

v.

LEADERSHIP STUDIES, INC.,

Counterclaim-Defendant.

CASE NO. 15CV1831 WQH-KSC

**DECLARATION OF JEFFERY J.
ZUBER IN SUPPORT OF
LEADERSHIP STUDIES, INC.'S
OPPOSITION TO BLANCHARD
TRAINING'S MOTION TO
DISMISS TRADEMARK CLAIMS
(THIRD, FOURTH, AND FIFTH
CAUSE OF ACTION) PURSUANT
TO FED.R. CIV. P 12(B) (1), AND IN
THE ALTERNATIVE MOTION
FOR SUMMARY JUDGMENT
PURSUANT TO FED. R. CIV. P. 56**

**[Filed Concurrently With Leadership
Studies, Inc.'s Opposition to
Blanchard Training's Motion to
Dismiss Trademark Claims (Third,
Fourth, and Fifth COA), And In the
Alternative Motion for Summary
Judgment**

Date: May 22, 2017

Judge: Hon. William Q. Hayes

**NO ORAL ARGUMENT UNLESS
REQUESTED BY THE COURT**

DECLARATION OF JEFFREY J. ZUBER

I, Jeffrey J. Zuber, declare as follows:

1. I am an attorney duly admitted to practice before this Court. I am a partner with Zuber Lawler & Del Duca LLP, attorneys of record for Plaintiff and Counterclaim-Defendant Leadership Studies, Inc. (“CLS”). I have personal knowledge of the facts stated herein and, if called to testify to these facts, I could competently do so.

2. All documents bearing a Bates label in the footer starting with “CLS” are true and correct copies of documents produced by Leadership Studies in this litigation, and all documents bearing a Bates label in the footer starting with “BLANCHARD” are true and correct copies of documents produced by Blanchard Training and Development, Inc. (“BTD”) in this litigation.

3. The “1982 Agreement” refers to the letter agreement signed by John Myers of Leadership Productions, Inc. circa May 1982.

4. The “1987 License” refers to the license agreement entered into by CLS and BTD on or about December 19, 1987.

5. “BTD’s MPA” refers to the memorandum of points and authorities filed by BTD in connection with the motion referenced in the caption hereto. [D.E. 65-1]

6. “CLS’ MPA” refers to the memorandum of points and authorities filed by CLS concurrently herewith in opposition to the motion referenced in the caption hereto.

BTD’s Desperately Attempts To Conjure A Discovery Cover-Up Conspiracy To Legitimize Its Late Reliance On The Lifeless 1982 Agreement

7. I reviewed the BTD’s MPA at D.E. 65-1, p.13 l.19 to p.18 l.11. This section of the MPA constitutes over four pages devoted to manufacturing an elaborate CLS discovery cover-up conspiracy (the “Discovery Conspiracy”). Under this Discovery Conspiracy, CLS ostensibly intended to obscure publicly available

1 information concerning a moot defense. I also reviewed John P. Oleksiuk's
 2 supporting declaration (the "Oleksiuk Decl.").

3 8. To the contrary, as discussed herein, BTB's new "theory" that the 1982
 4 Agreement somehow overrides the 1987 License is one concocted by its counsel in
 5 the course of this litigation, but one that is contradicted by the trail of documents
 6 produced by both sides. BTB's current lawyers in this action apparently stumbled
 7 upon and are attempting to resurrect this lifeless 1982 Agreement, and accordingly
 8 concocted this Discovery Conspiracy to attempt to gloss-over years of adherence to
 9 the 1987 License as the sole contract governing the ownership and use of the Mark.

10 9. Most importantly, for reasons set forth in detail in the papers filed
 11 herewith, *CLS never considered the 1982 Agreement relevant because it was*
 12 *superseded by the 1978 License.*

13 10. As set forth in the Declaration of Maureen Shriver ("Shriver Decl."),
 14 CLS' Chief Executive Officer, filed and served concurrently herewith, CLS had no
 15 knowledge of (a) the fact that LSP changed its name to Leadership Studies, and
 16 later Leadership Studies, Inc. or (b) the existence of the 1982 Agreement until those
 17 documents turned up in the course of discovery. *See* Shriver Decl. ¶¶2, 14.

18 11. Likewise, no one at CLS, had reason to believe that the 1982
 19 Agreement had any bearing on the parties' relationship with regard to the Mark,
 20 particularly since both Kenneth Blanchard and Richard Andrews confirmed to Ms.
 21 Shriver that the only agreements in that regard were the 1987 License, and an
 22 August 8, 2006 one-page agreement concerning use of the parties' marks in China.
 23 *See* Shriver Decl. ¶¶ 25-33.

24 12. The 1987 License discusses the history of the relationship between Dr.
 25 Hersey, Dr. Blanchard, the Mark, and the relevant companies, spanning the 1960s to
 26 the present (Dec. 19, 1987), *but does not mention the 1982 Agreement let alone its*
 27 *ongoing relevance.* BTB's eleventh-hour argument that the 1987 License was
 28 intended to be an extension of the 1982 Agreement is desperate and poorly

1 considered.

2 13. Instead, as discussed at length in CLS' MPA, and as set forth in the
3 documents referenced therein, in the Response to the Statement of Undisputed
4 Material Facts ("RSUMF"), and in the Declaration of Michele M. Desoer ("Desoer
5 Decl.") all submitted herewith, as the parties negotiated in advance of the 1987
6 License, they took into account the existence of LSP, and the drafts of what
7 ultimately became the 1987 License reflected the change in the relevant entities'
8 names.

9 14. BTD's Answer to Leadership Studies' Third Amended Complaint
10 finally identified the 1982 Agreement as a possible defense over a year after the
11 lawsuit started. (D.E. 52, p.32 ¶ 31 to p.33 ¶ 32). No prior pleading mentioned it.

12 **CLS Produced The So-Called "Obscured" Information To BTB**

13 **In Initial Disclosures On August 3, 2016**

14 15. BTB's MPA and the Oleksiuk Decl. completely misrepresent the
15 timing of the production of documents that readily disclosed the relationship
16 between LSP and CLS.

17 16. On August 3, 2016, CLS produced its initial disclosures to BTB
18 consisting of documents Bates numbered CLS-00000001 to CLS-00005745. A true
19 and correct copy of the cover letter effecting the production is attached to RSUMF
20 as Exh. 52.

21 17. The information that BTB implies it figuratively beat out of CLS,
22 revealing that MED disappeared when it merged into the surviving entity
23 Leadership Studies, was ***already produced to BTB months earlier in initial***
24 ***disclosures***. The language on this *publicly filed and publicly available* "Agreement
25 of Merger" is clear and unambiguous concerning the merger of MED into
26 Leadership Studies, the survival of Leadership Studies, and the disappearance of
27 MED. A true and correct copy of this Agreement of Merger is attached to RSUMF
28 as Exh. 22 (CLS-00005252-5256).

1 18. BTD also falsely claims that the “smoking gun” documents it needed to
 2 finally understand the evolution of Leadership Studies Productions, Inc. (“LSP”) to
 3 Leadership Studies, and then to Leadership Studies, Inc., were first obtained from
 4 (*again publically available*) documents filed with the California Secretary of State
 5 on Nov. 28, 2016—three months later than CLS’ initial disclosures. BTD’s MPA at
 6 D.E. 65-1, p.15 l.21 to p.16 l.6; Oleksiuk Decl. ¶¶ 14 and 15 and Exh. L at 231-42.

7 19. However, the information disclosed in BTD’s “smoking gun”
 8 documents *was already disclosed by CLS*, in a U.S. Copyright Office ‘Form CA’,
 9 when ***produced to BTD over three months earlier in initial disclosures***. This
 10 document unequivocally states that, on July 15, 1985, LSP changed its name to
 11 Leadership Studies, and that in July 2009, Leadership Studies changed its name to
 12 Leadership Studies, Inc. The document also made clear both times that there was no
 13 transfer of ownership, simply a change in title. A true and correct copy of this
 14 document is attached to RSUMF as Exh. 42 CLS-00000568.

15 20. Compounding the absurdity of BTD’s Discovery Conspiracy
 16 accusations, another ‘Form CA’ document, also ***already produced to BTD months***
 17 ***earlier in initial disclosures***, contained the same information and disclosed the
 18 name changes from LSP to Leadership Studies to Leadership Studies, Inc. A true
 19 and correct copy of this document is attached to RSUMF as Exh. 42 at CLS-
 20 00000645.

21 21. Accordingly, to the extent that CLS had attempted to “obscure”
 22 evidence from BTD, it was doing so extremely poorly because it repeatedly, starting
 23 in its initial disclosures, produced documents that disclosed the facts it supposedly
 24 attempted to conceal. Every single shred of corporate information that BTD claims
 25 CLS attempted to hide in this great Discovery Conspiracy was in fact produced with
 26 redundancy *on the first day of discovery*, in CLS’s initial disclosures.

27 **CLS’s Discovery Responses Were Truthful, Complete, And Transparent**

28 22. After reading BTD’s four page accusation of CLS’ supposed unethical

1 efforts to hide relevant information from BTB, I reviewed the relevant discovery
 2 responses complained of in the motion papers and sought to reconcile them with
 3 BTB's parade of accusations. Although I knew that there had been no consideration
 4 whatsoever by CLS of avoiding questions on the 1982 Agreement, an agreement the
 5 parties long-ago treated as irrelevant, I was concerned that possibly, through
 6 inadvertence, a response might have been misleading.

7 23. I confirmed that all of the relevant responses were consistent with
 8 CLS's corporate documents that were produced in the initial disclosures.

9 24. The more precise information on corporate history (essentially, the two
 10 items in ¶¶ 17-18, *supra*) learned in BTB's *tortuous "hunt for the truth"* were
 11 available to BTB from these documents produced in CLS's initial disclosures.

12 25. In its motion, BTB accuses CLS of claiming

13 that MED 'merged with Leadership Studies Productions, Inc. to form
 14 'Leadership Studies,' the entity later renamed 'Leadership Studies,
 15 Inc.' (a.k.a. CLS), as the surviving entity,' (Oleksiuk Decl. Ex. K at
 16 216.) But Leadership Studies also stated in the same document that
 17 'Leadership Studies was the surviving entity of the 1985 merger
 between MED and Leadership Studies Productions.' (Oleksiuk Decl.
 Ex. K at 213.) Once again, the verified responses were incomplete
 and misleading.

18 BTB's MPA at D.E. 65-1, p.15:10-20. Both of these statements in CLS's responses
 19 were pulled directly from the corporate document Bates numbered CLS-00000645,
 20 *supra*, which states that "Management, Educations & Development, Inc. (M.E.D.)
 21 ***merged with*** Leadership Studies Productions, Inc. (L.S.P.) on September 30, 1985
 22 ***to form Leadership Studies***, a California Corporation."¹ (Emphasis added.) Thus,
 23 the responses were derived from company documents already shared with BTB.

24 26. Because the explanation of corporate history in the document was
 25 complete on its face, CLS reasonably relied upon it and didn't seek further
 26 documents that might differently describe the MED merger or name changes.

27 _____
 28 ¹ See the last section on this page, third paragraph from the bottom.

27. CLS did not order publicly available documents concerning its corporate history because it had no reason to deem them relevant beyond what CLS had already produced, and which already disclosed the corporate history of the relevant entities.

**BTD's Production Of Redundant Publically Available Documents
Had Zero Effect On CLS's Amended Responses Of Jan. 11, 2017**

28. BTD later requested additional discovery specifically related to the 1982 Agreement, after which CLS performed a subsequent document search and prepared responses. On Jan. 10, 2017, CLS located another copy of the "Agreement of Merger". A true and correct copy of this later produced copy of the already-produced Agreement of Merger is attached to the RSUMF as Exh. 23 (CLS-00022444-45).

29. When reviewing this document, CLS realized that the prior discovery responses needed to be amended to explain that MED merged into Leadership Studies, with MED disappearing and Leadership Studies surviving. These responses were quickly amended, verified, and served the very next day, January 11, 2017 as confirmed in BTD's MPA at D.E. 65-1, p.16 l.27 to p.17 l.8 (BTD's SUMF ¶ 2).

30. CLS produced the additional copy of the Agreement of Merger on March 8, 2017 with Bates numbers CLS-00022444-45. This was duplicative of the document produced by CLS in initial disclosures on Aug. 3, 2017 as set forth above.

31. BTD used these benign circumstances to recklessly prop up its Discovery Conspiracy theory, pointing out that CLS's amended responses served Jan. 11, 2017 followed BTD's production of publicly available corporate documents on Nov. 29, 2016. BTD' MPA at D.E. 65-1 p.15 l.21 to p.17 l.8. BTD's self-serving fill-in-the-blanks accusation process is once again false.

32. I have worked on this litigation since its inception, but I have rarely performed first-level document review. When I was supervising the preparation of CLS's Jan. 11, 2017 amended discovery responses, I was not even aware that we

1 had received any CLS corporate documents from BTM. If they had been reviewed
 2 and coded by that time, they were not presented to me as anything worth second-
 3 level review. The first time I was even aware that BTM produced these documents
 4 was when they were identified as the silver bullet in BTM's Discovery Conspiracy
 5 theory in the present motion papers.

6 33. CLS never thought that BTM would accuse CLS of withholding
 7 information on this non-issue and, as CLS's disclosures demonstrate, the
 8 *information had in fact been produced to BTM in the very first document*
 9 *production*. BTM is the only party obscuring the record here, attempting to explain
 10 why the 1982 Agreement had been forgotten for so long. This not a CLS cover-up,
 11 this is a desperate BTM eleventh-hour resurrection ceremony aimed at raising the
 12 1982 Agreement from the dead.

13 CLS's RFA Responses Were Amended

14 Only After Discussions with John Myers

15 34. BTM also argues that the CLS "evaded" BTM's third set of Requests
 16 for Admission ("3rd RFAs") due to furtherance of the Discovery Conspiracy. BTM's
 17 MPA at D.E. 65-1, p.16 ll.7-14, p.17 l.9 to p.18 l.7. Again, this is nonsense.

18 35. CLS served responses to BTM's 3rd RFAs on January 17, 2017. These
 19 responses correctly responded to the requests posed. Specifically, John Myers was
 20 LSP's President from 1979 to 1983, is no longer affiliated with CLS, and has not
 21 been for many years. Declaration of John Myers ("Myers Decl.") ¶¶ 1-2.

22 36. As before, CLS delved further into information not presently within
 23 CLS' knowledge to provide thorough discovery responses. We contacted John
 24 Myers to authenticate his signature on the 1982 Agreement, and whether he had
 25 *general authority to sign these types of agreements* (which was the request posed,
 26 *not whether he had authority to sign the 1982 Agreement, specifically*).

27 37. CLS's amended responses to RFAs served on February 6, 2017 reflect
 28 the information obtained from Mr. Myers, an individual who has had *no affiliation*

1 with CLS for over thirty (30) years. CLS further confirmed that Mr. Myers had
2 authority to sign the 1982 Agreement.

3 **BTD's Discovery Responses Admit Its Use of Mark Was Under 1987 License**

4 38. BTD's responses and amended responses to Requests for Admission
5 numbers 6 and 7 have consistently admitted that its use of the "Situational
6 Leadership®" (the "Mark") has been pursuant to the 1987 Agreement. A true and
7 correct copy of this record is attached to the RSUMF as Exh. 53.

8 39. Nothing in BTD's amended responses has ever indicated that it has
9 used the Mark pursuant to the 1982 Letter Agreement. *See, e.g., id.*

10 I declare under penalty of perjury under the laws of the United States of
11 America that the foregoing is true and correct.

12 Executed on this 8th day of May, 2017, at Los Angeles, California.

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15 Jeffrey J. Zuber
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